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87-863 (1)

NO.

Supreme Court, U.S.
FILED
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER 1987

HERBERT O. JENSEN,

PETITIONER,

v.

WINSTON SATRAN, WARDEN,

RESPONDENT.

PETITION FOR WRIT OF CERTORARI

THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

HERBERT O. JENSEN
BOX 5521 NDSP
BISMARCK, ND 58502-5521
PRO SE

88-803

I

QUESTIONS PRESENTED FOR REVIEW

1. Did the federal court fail to exercise reversible error in refusing to apply Petitioner's Due Process Clause, the 'cause and prejudice' exception as applied by the Supreme Court in

Engel v. Issac, 102 S.Ct. 1558 and

U.S. v. Fraly, 102 S.Ct. 1584 ?

2. Whether burden was placed on Petitioner for lack of malice when petitioner claimed self defense ?

3. Whether post-conviction trial court erred in refusing Discovery to obtain North Dakota Constitutional requirement of Oath of Office of County Judges who held initial and probable cause hearings to claim De Jure State Officers ?

4. Whether prosecution by information was constitutional where 1st degree murder was originally charged when North Dakota and United States Constitution hold that such individuals be charged by Indictments ?

5. Whether Courts erred in denying Petitioner's due Process Clause claim when State Law mandated degree of crime and sentence by jury after finding of guilty when Trial Judge determined both degree and sentencing ?

6. Whether Trial Court Reporter failed to transcribe Opening and Closing statements of both prosecutor and defense counsel; failed to transcribe jury instructions into the transcript; certifying the transcript as a complete and true record after petitioner paid costs of transcript, severely prejudicing petitioner's Post-Conviction relief ?

7. Whether notification of Dangerous Special Offender application to the judge prior to trial and over objections of the petitioner; where judge refused to ORDER a Mistrial, violated due process and under State Law ?

8. Whether Court held sentencing and Dangerous Special Offender hearing at the same time violated petitioner's due process right to cross examine witnesses and pre-sentence

Report ?

9. Whether Special Assistant Attorney General, Edwin F. Zuern, prosecuted post-convictions and habeas corpus petitions without special written appointment to act in behalf of State of North Dakota, violated due process ?

10. Whether claim's of ineffective assistance of counsel were severely prejudiced by dismissal of habeas corpus petition where Federal Judge Patrick A. Conmy was formerly a law partner of defense counsel Irving B. Nodland during petitioner's trial and Judge Conmy appointment of a 8th Circuit Judge, Frank Magill, to hear appeal is in violation of Federal Code of Judicial Conduct and Federal Law ?

11. Whether State and Federal dismi-ssals are in 'bad faith' in petitioner's efforts to obtain relief from his conviction come under the 'extraordinary circumstances' doctrine and sentencing came under ex post facto clause ?

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The petitioner, HERBERT O. JENSEN, respectfully prays that a Writ of Certiorari Issue to review the ORDER of the United States Court of Appeals For the Eighth circuit, Denial of Motion For Reconsideration, dtd 9/22/87; MANDATE for Denial of Certificate of Probable Cause, dtd 10/5/87 of ORDER, dtd 8/26/87 by Judge Magill; ORDER of Denial of certificate of Probable Cause, dtd 6/23/87 by Judge Magill; JUDGMENT, MEMORANDUM and ORDER, Dismissing Habeas Corpus Petition with Prejudice, dtd 5/27/87 by Judge Magill; AMENDED ORDER, dtd 5/4/87 and ORDER, dtd 4/22/87, by Judge Conmy.

OPINION BELOW

The ORDER of Denial of Motion For Reconsideration by The United States Court Of Appeals For The Eighth Circuit is attached hereto as Appendix A. The Mandate, dtd 10/5/87 of ORDER, dtd 8/26/87, signed by Judge Magill, is attached hereto as Appendix B. ORDER denying Certificate Of Probable Cause, dtd 6/23/87, by Judge Magill is hereto attached as

Appendix C. JUDGMENT, dtd 5/27/87 that case was Dismissed With Prejudice is hereto attached as Appendix D. MEMORANDUM and ORDER, dtd 5/27/87, Dismissing Habeas Corpus Petition With Prejudice by Judge Magill, is entered hereto as Appendix E. AMENDED ORDER, dtd 5/4/87, by Judge Conmy is hereto attached as Appendix F. ORDER, dtd 4/22/87 by Judge Conmy appointing Judge Magill to case is hereto attached as Appendix G. ORDER, dtd 6/19/86, Accepting Case by Judge Benson is hereto attached as Appendix H. ORDER, dtd 6/13/86, by United States Court of Appeals For The Eighth Circuit GRANTING Certificate Of Probable Cause is hereto attached as Appendix I. ORDER. dtd 4/1/86 Denying Certificate of Probable Cause by the 8th Circuit is hereto attached as Appendix J. ORDER, dtd 3/6/86, Denying Certificate Of Probable Cause by Judge Conmy is attached hereto as Appendix K. ORDER, dtd1/23/86, Dismissing Habeas Corpus Petition With Prejudice by Judge Conmy is hereto attached as

Appendix L. MEMORANDUM and ORDER, dtd 10/22/86 Holding Habeas Corpus in Abeyance until North Dakota Supreme Court heard this case is hereto attached as Appendix M.

JURISDICTION

This Court's jurisdiction is invoked under Title 28 U.S.C. Sec. 1254 (1).

STATUTORY PROVISIONS INVOLVED

Petitioner respectfully suggests that three (3) Federal Statutes, Title 18 U.S.C. Sec. 3575, Title 28 U.S.C. Sec.'s 295 & 753, and Federal Code of Judicial Conduct as guiding references over all and numerous provisions of the State of North Dakota enactments are attached as Appendix's N. through Y.

STATEMENT OF THE CASE

Petitioner was sentenced to two (2) 20 year Class A felonies with two (2) ten year Dangerous Special Offender enhancements to run consecutively with the Class A felony charges. Petitioner was charged under the old law of 1st degree murder, NDCC 12-27-08 and 12-27-12. On

1st trial Trial Court allowed Motion to Strike Murder in the 1st Degree and instructed the jury, Murder in the 2nd degree and to drop the element of premeditation.

Petitioner appealed and requested in-digency status, North Dakota Supreme Court denied. State v. Jensen, 241 NW2d 557 (ND 1976). On 2/17/77 in State v. Jensen, 251NW2d 182 (ND 1977), The North Dakota Supreme Court reversed and remanded for a new trial. Under NDCC 12.1-32-09, Paragraph 1., Subsection e., NO five (5) day Notice was given for a Hearing of imposition of additional sentence. The North Dakota Supreme Court suggested that in the future that the five (5) day Notice would be given by the State. State v. Jensen, supra, at 188 (14).

In State v. Jensen, 265 NW2d 691, the North Dakota Supreme Court allowed the petitioner to obtain a trial transcript, providing that petitioner would first assign one half of his retirement pay to Wells County.

Transcripts did not have Opening or Closing Statements, Did Not have jury instructions and were Certified that Transcript was a full and complete record by the Court Reporter.

In State v. Jensen, 282 NW2d, The North Dakota Supreme Court affirmed petitioner's conviction on July 18, 1979. Rehearing was denied on August 2, 1979.

On January 16, 1982, petitioner applied for post-conviction relief. On 8/23/82, the State District Court orally announced its findings and ORDER denying post-conviction relief and the Motion For A New Trial was Denied. Petitioner filed his Notice Of Appeal on 8/30/82, several weeks before the Trial Court signed the Written ORDER of Denial on 9/16/12.

On appeal, the North Dakota Supreme Court affirmed the Denial of a New Trial. The Court also held that the petitioner's appeal for Post-Conviction was premature and dismissed that portion of the appeal.

State v. Jensen, 333 NW2d 686 (ND 1983).

At the same time the Court recognized that the 'six-month' time period during which petitioner could conceivably have corrected the defect in the timing of his Notice of Appeal was expired. Supra, at 960, Citing NDCC 29-32-09.

On 9/1/84, petitioner filed a Habeas Corpus Petition in the United States District Court. On 10/22/84, Judge Van Sickle filed MEMORANDUM and ORDER, holding action in abeyence, that petitioner was to file for relief in the North Dakota Supreme Court, and Discovery Denied without Prejudice.

On 1/14/85, petitioner refiled a Habeas Corpus Petition in the North Dakota Supreme Court as recommended by Federal Judge.

On 9/4/85, the North Dakota Supreme Court QUASHED petitioner's Habeas Corpus Petition, Crim No. 1068.

On 9/9/85 Petitioner refiled an Amended Habeas Corpus Petition, A1-84-183, which was denied by Judge Conmy on 1/23/86.

On 1/26/86, petitioner filed for a

Certificate of Probable Cause and Notice of Appeal with Motion to be Heard On the Original Record. Filing fees were paid on 2/6/86.

On 3/7,86, petitioner was denied Certificate of Probable Cause by Judge Conmy. On 4/1/86, petitioner was Denied Certificate Of Probable Cause by 8th Circuit Court of Appeals.

On 4/23/86, petitioner sent Motion For Reconsideration to the 8th Circuit Court of Appeals based on Prejudice of Judge Conmy. On 6/13/86, the 8th Circuit Court of Appeals Remanded the case back to District Court.

On 6/19/86 Judge Paul Benson took assignment of the case and designated Magistrate Karen K. Klein to conduct Hearing and submit findings and recomendations.

On 8/8/86, petitioner sent 32 documents for the Evidentiary Hearing to be conducted by Magistrate Klein.

Even though Affidavit of Prejudice had been filed on 5/2/86 and 8th Circuirt Court of Appeals had issued Certificate of Probable

Cause, Judge Conmy issued ORDER, dtd 4/22/87 and AMENDED ORDER, dtd 5/4/87, Appointing Judge Frank Magill as presiding Judge in violation of Title 28 U.S.C. Sec. 295.

On 5/27/87, Judge Magill issued MEMORANDUM and ORDER dismissing Petitioner's Habeas Corpus Petition With Prejudice along with Judgment the same date.

On 6/1/87, Petitioner Motioned For A Certificate of Probable Cause and on 6/2/87, filed Notice of Appeal with Motion For Transmission of the Record with Certificate of service By Mail.

Filing Fee of $5.00 was paid on 7/13/87 and $100.00 paid on 7/21/87.

Appellant filed Appellant's Brief and Appendix on 7/27/87. On 8/26/87, Petitioner received a ORDER, Denying Certificate of Probable Cause.

Motion For Reconsideration was filed on 9/5/87 with 21 exhibits. Petitioner's Motion For reconsideration was Denied as Untimely by

the 8th Circiuit court of appeals, dtd 9/22/87.

Mandate was issued on 10/6/87 by Judge Magill for ORDER, dated 8/26/87.

REASONS GRANTING THE WRIT

I

THE STATE PLACED THE BURDEN ON PETITIONER TO PROVE SELF-DEFENSE AND LACK OF MALICE

Petitioner was at ALL times under arrest on warrant of 1st degree murder. Informations filed on May 19, 1975, stated that petitioner committed an offense of murder in the 1st degree in violation of NDCC 12-27-08(1) and 12-27-12, with malice aforethought and with premeditated design to effect death, willfully destroying the lives of Abraham and Vivier. Peanalty Section is NDCC 12-27-13.

Informations filed on October 4, 1977 that petitioner committed the offense of murder in the 2nd degree in violation of NDCC 12-27-08 and 12-27-12 with malice aforethought or envincing a depraved mind, willfully destroying the lives of Abraham and Vivier. Penalty

Section NDCC 12-27-14.

The jury instructions given on 10/19/77 for malice by Trial Court, 'Malice' is a necessary element of the crime of murder in the 2nd degree. Malice may be either expressed or implied. the term 'malice' and 'maliciously', import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established by proof or presumption of law. (Page 13, Jury Instructions).

Instructions for self defense, last paragraph, 'In order for the defendant to have been justified in the use of deadly force in self defense he must not have provoked the assult on him or have been the aggressor. Mere words without nore do not constitute provocation or aggression.' (Page 16, Jury Instructions).

In Reed v. Ross, 104 S.Ct. 2901, prisoner appealed his conviction on several grounds, he did not challenge the constitutionality of the malice instructions.

In Mullaney v. Wilbur, 95 S.Ct. 1881, struck down, as violative of due process, the requirement that the defendant bear the burden of proving lack of malice. In Hankerson v. North Caolina, 97 S.Ct. 2339, held that Mullaney was to have retoactive application.

In Engle v. Issac, 102 S.Ct. 1558 and U.S. v. Frady, 102 S.Ct. 1584, petitioner holds that he meets the 'cause and prejudice' requirement to excuse his own failure to raise a challange of the jury instruction.

That the wording in the criminal judgments dtd 12/12/77, Crim No.'s 613 & 614, is 20 years for 2nd degree murder, taken from NDCC 12-27-14 and 10 years as a Dangerous Special Offender is the wording of NDCC 12.1-32-09(2), the new law passed effective 7/1/75. The North Dakota Supreme Court in State v. Jensen, 251 NW2d at 187 (12), 'reversed and remanded Jensen's case because he was entitled to an instruction unclouded by reference to former statute and

interpretions no longer in effect. The Judgment for sentencing are a combination of both old and new laws, nense, under that kind of rationale the cases should be overturned.

II

THE STATE REFUSED TO ALLOW PETITIONER DISCOVERY ALLOWED BY NORTH DAKOTA POST-CONVICTION STATUTE.

Petitioner has the right under NDCC 29-32-07 which provides that ALL rules and statutes applicable is civil proceedings including pre-trial and discovery procedures are available to the parties ....'

State v. Lueder, 252 NW2d 861. 866;

State v. Tinsley, 325 NW2d 177, 179, Ftnte 2,; State v. Jensen, 333 NW2d 686, 690.

Judge Benny Graff, before whom post-conviction proceedings were taken, placed a protective ORDER against petitioner from 'bothering' Ben Meier, Secretary of State for attempting to obtain Oath of Offices of the two (2) County Court Judges before whom petitioner

appeared prior to be bound over to District Court under NDCC 44-04-18, acess To Public Records.

Petitioner alleges that the County Court Judges were de jure officers by Stare Decisis of North Dakota, holding cases,

State of North Dakota ex rel Johnson v. Bloom, 49 ND 890, 193 NW 940;

State of North Dakota ex rel Johnson v. Cahill, 49 ND 895, 193 NW 938

failure of . . . to file his oath of office with Secretary of State within the time prescribed by law, creates a vacancy in such office and works a forfeiture of all rights thereto on the part of the person who so neglected to file his oath of office. Petitioner claims that the judges were de jure officers during petitioner's appearance before them on his murder charges and such decisions rendered by them are null and void.

Judge Benny Graff in District Court Post-Conviction Hearing, dtd 6/5/81, stated 'that

petitioner's subpoena decus tecum for County Judges to produce Oaths of Office were 'garbage' !

III

THE COURT DID NOT GIVE JURY INSTRUCTIONS PETITIONER WAS ENTITLED UNDER LAW FOR DEGREE OF CRIME AND AMOUNT OF SENTENCE BY JURY FINDING OF GUILTY.

The Trial Court did not tell the petitioner of his rights under NDCC 12-06-06, which provides that in jury trials of murder under the law prior to July 1, 1975, jury SHALL determine the punishment to be inflicted and degree of crime. State v. Noah, 20 ND 281, 124 NW 1121;
State v. Mueller, 40 ND 35, 168 NW 66;
State v. Carter, 50 ND 270, 195 NW 567;
State v. Whitman, 79 NW2d 528.

Judge Fredricks showed extreme prejudice by reading to the jury the penalty or punishment of the case stated as follows: 'In arriving at a verdict in this case you must not discuss or

consider the subject of penalty or punishment, as that is a matter which lies with the Court and must not in any way enter into your deliberations or effect your deliberations or effect your decision as to the guilt or innocence of the defendant. (Jury instructions, dtd 10/19/77, page 28, lines 1-6).

IV

THE COURT REPORTER DID NOT TRANSCRIBE OPENING AND CLOSING STATEMENTS; JURY INSTRUCTIONS; CERTIFIED THAT TRANSCRIPT WAS A TRUE AND CORRECT COPY FOR WHICH THE PETITIONER PAID IN FULL.

Petitioner claims that the duties of the Court Reporter is to record ALL proceedings of the trial court pursuant to NDCC 27-06-03. In petitioner's case the Court Reporter DID NOT comply with the law, making Post-Conviction claims difficult to establish prejudice of the prosecution by transcript proceedings. the North Dakota statute is similar to Title 28 U.S.C. Sec. 753(b). The

Court Reporter left out the Opening and Closing Statements; Jury Instructions, and Certified that the transcript as a complete record. Petitioner Motioned the North Dakota supreme court for a New Trial and was denied to correct this deficiency of missing portions of the transcript; State v. Myers, 19 NW2d 17;
U.S. v. Selma, 559 F2d 1303;
U.S. v. Garner, 581 F2d 481;
Hardy v. U.S., 84 S.Ct. 424.
The missing portions were requested from the Court Reporter but he failed to respond under Discovery Rules, claiming that he was not a party to Post-Conviction proceedings.

Petitioner Motioned the North Dakota Supreme court for return of payments of transcript fees and was denied on 10/21/82, by ORDER of the North Dakota Supreme Court.

V

TRIAL JUDGE WAS TOLD BEFORE TRIAL
THAT STATE WAS FILING DANGEROUS
SPECIAL OFFENDER IN VIOLATION OF

NDCC 12.1-32-09(3). (1975-1977).

The State prosecutor, Calvin Rolfson, told the trial Judge that he filed a Dangerous Special Offender Notice and he would file the NOTICE no matter what sentencing statute the defendant used in sentencing. In U.S. v. Baily, 537 F2d 845, the enhancement portion of defendent's sentences were overturned. U.S. v. Tramunti, 377 FSupp 6; U.S. v. Noland, 495 F2d 529.

The prosecutor must define what he believes defendant to be 'dangerous', if he does not know, the notice is defective. U.S. v.Kelly, 384 FSupp 1394, aff'd 519 F2d 251, (CA8 MO). It is noted that Title 18 U.S.C. Sec. 3575, Increased sentence for Dangerous Special Offender, is prosectively repealed by Act, October 12, 1984, P.L. 98-473, Title II, Ch. II, sec. 212(a)(2) in part, 98 Stat. 1987, effective on the first calendar month beginning 24 months after enactment on October 12, 1984 . . ..'

VI

THE TRIAL COURT HELD SENTENCING AND DANGEROUS SPECIAL OFFENDER HEARING AT THE SAME TIME IN VIOLATION OF NDCC 12.1-32-09 (4). (1975-1977).

Petitioner did not receive the five (5) Day Hearing Notice required by NDCC 12.1-32-09(4). Petitioner was not able to examine Presentence Report, prepare for compulsory process or cross-examine witnesses that may have appeared to apply the Dangerous Special Offender status. CF: U.S. v. Stewart, 511 F2d 326;
U.S. v. Bowdach, 561F2d 1160;
U.S. v. Warne, 572 F2d 57;
U.S. v. Weston, 708 F2d 302;

In State v. Miller, 658 P2d 808, it was improper for the court to sentence the defendant for a 'dangerous nature offense' where the issue of dangerousness of the defendant was not submitted to the jury and the verdict did not include a finding that the defendant knowingly and intentionally caused

physical injury. State v. Parker, 624 P2nd 294; State v. Tresize. 623 P2d 1; State v. Barrett, 644 P2d 242.

Trial Judge Fredricks gave in to prosecutor's demand to combine sentencing and Dangerous Special Offender hearing together, denied petitioner to Sixth Amendment Right as petitioner did not have the opportunity to subject prosecution's case to meanful adversarial testing that made the Dangerous Special Offender Hearing process presumtively unreliable.

As in U.S. v. Cronic, 104 S.Ct. 2039, 2047, No specific of showing of prejudice was required in Davis v. Alaska, 94 S.Ct. 1105, because the petitioner had been 'denied the right' to effective cross-examination 'which would be constitutional error of the first magnitude and no amount of showing of the want of prejudice would cure it.' Ib. at 94 S.Ct. at 1111, Citing Smith v. Illinois, 88 S. ct. 748, 749; and Brookhart v. Janis, 86

S.Ct. 1245. 1246.

VII

INEFFECTIVE ASSISTANCE OF COUNSEL PREJUDICED PETITIONER'S DEFENSE.

Petitioner has presented 36 issues to over come presumption that defense counse, Irving B. Nodland has rendered in this case, holding in McQueen v. Swenson, 498 F2d 207, 218 (8th Cir 1974) that; 1) There was a failure to perform an essential duty owed by the defense attorney to his client; 2) that failure prejudiced the defense.

In Hawkman v. Parratt, 661 F2d 1161, 1179, the attorney did not advise the petitioner of all the availavble options and possible consequences, as defense attorney failed to do in petitioner's case. Hawkman was granted his application for a Writ of Habeas Corpus on the single issue of ineffective assistance of counsel and the 8th Circuit Court of Appeals aff'd on 10/14/81. Ford v. Parratt, 638 F2d 115;

Tinlin v. Parratt, 680 F2d 50 (8th Cir. 1982); Thomas v. Lockhart, 738 F2d 307 (8th cir. 1984); Strickland v. Washington, 104 S.Ct. 2052.

VIII

SPECIAL ASSISTANT ATTORNEY GENERAL PROSECUTED POST-CONVICTION AND HABEAS CORPUS PETITIONS WITHOUT APPOINTMENT OF PRESENT ATTORNEY GENERAL IN VIOLATION OF NDCC 54-12-08.

Petitioner has been protesting the intervention of Special Assistant attorney General's in prosecution of his cases where neither trial NOR judge reviewing post-conviction issued any ORDERS under NDCC 11-16-07 and 54-12-04 for Attorney General's Office to prosecute. Special Assistant Attorney General Edwin F. Zuern has been prosecuting the post-conviction and habeas corpus petitions in State of North Dakota and Federal Courts without special appointment in writing from the present Attorney General,

Nickolas Spaeth, pursuant to NDCC 54-12-08. Accordingly a specail appointment mandates before attorney of record can appear in court to prosecute, MUST apply !

The acts of the Special Assistant Attorney General Edwin F. Zuern violates the mandate of special appointment 'in writing' by the Attorney General. State v. Stepp, 45ND 516,178 NW 951.

In Schneider v. Ewing, 310 NW2d 581, 583, the North Dakota Supreme Court recommended that NDCC 11-16-06, which allows the district court to request the attorney greneral or assistant attorney general to take charge or to appoint and attorney to take charge when the state's attorney refuses or is unable to take action.

Under 158 ALR 529, habeas corpus is the proper writ on ground of defective title to office of judge, prosecuting attorney, or other officer participating in petitioner's trial or confinment.

IX

FEDERAL JUDGE REVIEWING HABEAS CORPUS PETITION FAILED TO SHOW THAT HE WAS LAW PARDNER OF PETITIONER'S DEFENSE COUNSEL FOR TRIAL HELD ON 10/4/77 AND APPOINTMENT OF 8TH CIRCUIT COURT JUDGE IN VIOLATION OF JUDICIAL CODE OF CONDUCT AND FEDERAL LAW.

Petitioner alleges that Patrick A. Conmy has violated Federal Code of Judicial Conduct, CANON 3.: 'A judge should perforn the duties of his office impartially and diligently.'

C. Disqualification: (1)(b) he served as a lawyer in the matter controversy, or lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter...'

D. Remittal of Disqualification: 'A judge disqualified by the terms CANON 3(c)(1)... may instead of withdrAewing from the proceeding disclose on the record the basis of his disqualification ....'

Judge Conmy interferred with this case by issuing ORDER and AMENDED ORDER assigning this case to Judge Frank Magill after Judge Benson accepted this case on Issue of Certificate of Probable Cause by the 8th Circuit Court of Appeals.

Petitioner cites the following cases for bias and prejudice filed under Title 18 U.S.C. Sec. 144: Dupan Corp. v. Deering Milliken, 400 FSupp 497, 504; Schweiker v. McClure, 102 S.ct. 1665, 1668, Footnote 4; OEGay v. Harris, 93 S.Ct. 2152; McClure v. Harris, 503 FSupp 409, 414, 415.

Petitioner cites the following cases for Disqualification filed under Title 18 U.S.C. Sec. 455:

Berger v. U.S., 41 S.ct. 230, 234;

U.S. v. Dodge, 538 F2d 770, 781;

U.S. v. Grennell Corp., 86 S.Ct. 1689, 1710;

U.S. v. State of Ala., 582 FSupp 1197, 1205.

Judge Conmy DID NOT have the authority to assign a superior Court Judge to petitioner's case pursuant to Title 28 U.S.C. Sec. 295.

The point at law is best described in: re Corrugated Container Antitrust Litigation, 662 F2d 875, 779 (1981), Where the Court under II Jurisdiction A. States:

> 'In our federal judicial system, judge of a particular district court may exercise their authority ONLYwithin that district except under specific limited designations permitted by statute... When so designAted the judge sits as a judge of the Court to which he is assigned. but he DOES NOT EXERCISE extraterritorial jurisdiction in his capicity as a judge of his home court to which he is permanently assigned.'

X

'BAD FAITH' ACTIONS OF EXTRAORDINARY 'CIRCUMSTANCES' MAKES STATE AND FEDERAL RULINGS CONSTITUTIONALLY INFIRM.

The United States Supreme Court in Younger Doctrine left room for federal equitable intervention in a state criminal

trial where there is a showing of 'Bad Faith' or 'harrassment' by state officials responsible for prosecution.

Younger v. Harris, 92 s.Ct. 746, 755;
Hicks v. Miranda, 95 S.Ct. 2281, 2295;
Kugler v. Holfant, 95 S.Ct. 1524, 1531;
Tainter v. Hernandez, 97 S.Ct. 1911, 1917;
Moore v. Sims, 99 S.Ct. 2371, 2382.

Petitioner alleges the revised law under which he was sentenced, 1975 to 1977, would provide all elements necessary to bring it within the ex post facto prohibition.

Miller v. Florida, 107 S.Ct. 2446;
Calder v. Bull, 3 Dall. 386.

In effect petitioner received two sentences for each offense. Petitioner claims that sentence should have followed North Dakota State Law in effect at time offenses occurred.

Weaver v. Graham, 101 S.Ct. 960.

CONCLUSION

For the following reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

Respectfully submitted

Herbert O. Jensen

HERBERT O. JENSEN
Box NDSP
Bismarck, ND 58502-5521

Subscribed and sworn hereto before me on this 9th Day of November 1987. My commission expires on:

George Westphal
NOTARY PUBLIC

GEORGE WESTPHAL
NOTARY PUBLIC SEAL
State of North Dakota
My commission expires 10-21-92

CERTIFICATE OF SERVICE BY MAIL

It is hereby certified that a true and correct enclosed Petition for Writ of Certorari to the United States Supreme Court was mailed: 40 copies - J.F. Spaniol, Jr., Clerk of court, One 1st St., N.E., Washington, D.C. 20543; 1 copy Mr. Nickolas Spaeth, Attorney General, State Capitol Bldg., Bismarck, ND 58505, was mailed on this 9th Day of November 1987, postage prepaid at the NDSP, Box 5521, Bismarck ND 58502-5521.

Herbert O. Jensen

HERBERT O. JENSEN
Box 5521 NDSP
Bismarck, ND 58502-5521

Subscribed and sworn hereto before me on this 9th Day of November 1987. My commission expires on:

George Westphal
NOTARY PUBLIC

GEORGE WESTPHAL
NOTARY PUBLIC SEAL
State of North Dakota
My commission expires 10-24-92

APPENDIX A

UNITED STATE COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-5289ND

Herbert O. Jensen	*	
	*	
Appellant	*	
	*	
vs.	*	Appeal from the United
	*	States Court for the
Winston Satran	*	District of North
	*	Dakota
Appellee	*	
	*	

Appellant's motion for reconsideration of the Court's order of August, 1987, has been considered by the Court and is denied as untimely.

September 22, 1987

Order entered at the Direction of the Court:

/s/Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ys

APPENDIX B

UNITED STATE COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

RECEIVED
OCT 2 1987
EDWARD J. KLECKER,
U.S. DISTRICT CLERK,
COURT-NORTH DAKOTA

FILED
OCT 6 1987
EDWARD J. KLECKERCLERK,
U.S. DISTRICT
COURT-NORTH DAKOTA

No. 87-5289ND

Herbert O. Jensen *
*
Appellant *
* Appeal from the United
vs. *
* States Court for the
Winston Satran, *
Warden, North Dakota* District of North
State Penitentiary *
* Dakota
Appellee. *

Appellant's application for a certificate of probable cause is denied.

August 26, 1987

'Let the within Mandate be filed and entered on the Clerk's Records.'

Dated: October 5,1987 /s/Frank Magill

JUDGE, UNITED STATES CIRCUIT

A true copy:

ATTEST: /s/ Robert D. St. Vrain

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED 9/30/87

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 6th day of Oct., 1987.

EDWARD J. KLECKER

By: /s/Deborah Thomasen

Deputy

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

FILED

JUN 23 1987

EDWARD J. KLECKER

CLERK, U.S. DISTRICT

COURT-NORTH DAKOTA

No. 87-5289ND

Herbert O. Jensen, *
*
Petitioner, *
*
vs. * Civil No. A1-84-183
*
*
Winston Satran, Warden, *
*
Respondent, *

ORDER

This matter is before the Court on Jensen's motion to issue a certificate of probable cause allowing him to appeal from the order of this court dated May 27, 1987, dismissing his application for a writ of habeas corpus.

In his application for a certificate of probable cause, Jensen asserts that he was wrongly prosecuted by information, not indictment, that his transcript wrongly omitted opening and closing statements, that the State showed prejudice by requesting Special Dangerous Offender status, that he was wrongly sentenced by the jury, not the judge, and that his sentencing was wrongly combined with special Dangerous Offender hearing. This court followed the mandate of Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the very purpose of which is to eliminate orders to show cause whenever, as here, it plainly appears from the face of the petition and any exhibits annexed to it, that petitioner is not entitled to habeas relief.

For the reasons stated in its order of May 27, 1987, this court believes and so certifies that the appeal herein is legally frivolous and therefore not taken in good faith as a matter

of law, and this court declines to issue a certificate of probable cause.

Dated this 23rd day of June, 1987.

/s/Frank Magill

Frank Magill

United States Circuit Judge

Sitting by Designation

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 24th day of June 1987.

EDWARD J. KLECKER, CLERK

By:/s/C.D. MAIER

Deputy

APPENDIX D

UNITED STATE DISTRICT COURT

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

FILED

OCT 6 1987

EDWARD J. KLECKER

CLERK, U.S. DISTRICT

COURT-NORTH DAKOTA

Herbert O. Jensen JUDGMENT IN A CIVIL CASE

vs. CASE NUMBER A1-84-183

Winston Satran, Warden, North
Dakota State Penitnitary

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx Decision by Court.

IT IS ORDERED AND ADJUDGED that this case is DISMISSED with prejudice.

NOTICE OF ENTRY

Take notice that the original of

this copy was entered in the Office of the clerk of the United States District Court for the District of North Dakota on the 27th Day of May 1987.

EDWARD J. KLECKER, CLERK

By: s/ Sheila M. Beauchene

Deputy

Date: May 27, 1987

EDWARD J. KLECKER

Clerk

s/Sheila M. Beauchene

(by) Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

FILED

MAY 27 1987

EDWARD J. KLECKER

CLERK, U.S. DISTRICT

COURT-NORTH DAKOTA

Herbert O. Jensen,	*	
	*	
Petitioner,	*	
	*	
vs.	*	Civil No. A1-84-183
	*	
Winston Satran, Warden	*	
	*	
Respondent	*	

Memorandum and Order

Petitioner Herbert Jensen originally filed a habeas corpus petition before this court on September 6, 1984, then filed an amended petition on September 8, 1985. On January 32, 1986, United States District Judge Patrick A. Conmy entered an order dismissing Jensen's petition, and later entered an order denying

his motion for a certificate of probable cause.

On April 1, 1986, a panel of the Eighth Circuit Court of Appeals also denied Jensen's application for a certificate of probable cause. Jensen then filed with the Eighth Circuit a motion for reconsideration alleging, inter alia, that Judge Conmy was biased because he was a former law partner of Jensen's trial counsel.

Based on this unchallenged allegation, the Eighth Circuit vacated its prior order, granted a certificate of probable cause, vacated Judge Conmy's order, and remanded the case to the district court with instructions to assign it to another judge for consideration of Jensen's habeas corpus claim. In an order dated April 22, 1987, Judge Conmy had the case transferred to United States Circuit Judge Frank Magill, who has been assigned to hear cases in this district.

After a review of the record, this court finds that Jensen's claims completely lack

merit. Under Rule 4 of the Federal Rules governing habeas corpus actions, this court may summarily dismiss a habeas corpus petition 'i(f) it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court * * *.'

The record reflects that Jensen raised substantially the same claims before the North Dakota supreme court, Which, after holding hearings and carefully reviewing the allegations< denied him relief.

State v. Jensen, 333 NW2d (N.D. 1983).

In his petition before the court, Jensen sets forth no new facts, but seeks the opportunity for more discovery regarding, primarily, the completeness of trial transcripts and the legality of the positions held by public officers involved in this case. These issues have been adequately addressed. Further more, even assuming arguendo that these allegations have merit, they nontheless fail to

make out federal law or constitutional violations.

Jensen argues a denial of equal protection in that he was subjected to mental examinations, and in that the Dangerous Special Offender status and provisions for additional sentencing were applied to him, but not others similarly situated. These claims fail to state a violation of Jensen's equal protection rights. Nor was he denied due process by the fact that several Assistant Attorneys General were involved in his prosecution. See NDCC && 54-12-01(5), 54-12-06. That Jensen's bail was raised did not subject him to double jeopardy. Jensen raises numerous points in support of his claim that he received ineffective assistance of counsel. His counsel's performance has been reviewed and correctly found adequate. See State v. Jensen, 333 NW2d 686, 697 (N.D. 1983).

Although a pro se petition should be liberally construed and not dismissed unless

the petitioner presents no set of facts under which a court might grant relief, Wallace v. Lockhart, 701 F2d 719, 727 (8th Cir.), cert. denied, 464 U.S. 934 (1983), this court finds that such is the case here. Because it is this court's duty to screenout such frivolous applications for a writ of habeas corpus, Higgins v. Steele, 195 F2d 366, 369 (8th Cir. 1952), this action is dismissed.

IN LIGHT OF THE FOREGOING CONSIDERATIONS, IT IS ORDERED THAT THIS PETITION OF HABEAS CORPUS BE DISMISSED WITH PREJUDICE. THE CLERK IS DIRECTED TO ENTER JUDGMENT ACCORDINGLY.

Dated this 27th day of May, at Fargo, North Dakota.

/s/Frank Magill

Frank Magill, Circuit Judge

Sitting by Designation

United States District Court

District of North Dakota.

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 27th day of May 1987.

EDWARD J. KLECKER, CLERK

By:/s/Sheila M. Beauchene

Deputy

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

FILED

MAY 4 1987

EDWARD J. KLECKER

CLERK, U.S. DISTRICT

COURT-NORTH DAKOTA

AMENDED ORDER

IT IS HEREBY ORDERED that the following civil cases currently pending in the Southwestern Division of the District of North Dakota be assigned to The Honorable Frank Magill, United States Circuit Judge, who has been assigned to hear cases in this district:

A1-84-183	Jensen v. Satran
A1-85-142	Jensen v. Satran
A1-86-154	Jensen v. Haines
A1-86-159	Jensen v. Haines
A1-87-015	Jensen v. Haines
A1-87-021	Jensen v. Haines

A1-87-025 Jensen v. Haines

A1-87-026 Jensen v. Haines

IT IS FURTHER ORDERED that all subsequent filings be sent to: Office of the Clerk, United States District Court, P.O. Box 870, Fargo, North Dakota 58107; and that a copy of all said susequent filings be sent to The Honorable Frank Magill, United StatesCircuit Judge, P.O. Box 6009, Fargo, North Dakota 58108.

Dated this 4th day of May, 1987, at Bismarck, North Dakota.

/s/Patrick A. Conmy

Patrick A. Conmy, Chief Judge

UNITED STATES DISTRICT COURT

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 4th day of May 1987.

EDWARD J. KLECKER, CLERK

By:Deborah Thomsen, Deputy.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

FILED

APR 22 1987

EDWARD J. KLECKER

CLERK, U.S. DISTRICT

COURT-NORTH DAKOTA

O R D E R

IT IS HEREBY ORDERED that the following civil cases currently pending in the Southwestern Division of the District of North Dakota be assigned to The Honorable Frank Magill, United States Circuit Judge, who has been assigned to hear cases in this district:

A1-84-183	Jensen v. Satran
A1-86-154	Jensen v. Haines
A1-86-159	Jensen v. Haines
A1-87-015	Jensen v. Haines
A1-87-021	Jensen v. Haines
A1-87-025	Jensen v. Haines

A1-87-026 Jensen v. Haines

IT IS FURTHER ORDERED that all subsequent filings be sent to: Office of the Clerk, United States District Court, P.O. Box 870, Fargo, North Dakota 58107; and that a copy of all said subsequent filings be sent to: The Honorable Frank Magill, United States Circuit Judge, P.O. Box 6009, Fargo, North Dakota 58108.

Dated this 22th day of April, 1987, at Bismarck, North Dakota.

/s/Patrick A. Conmy

Patrick A. Conmy, Chief Judge

UNITED STATES DISTRICT COURT

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 22th day of April, 1987.

EDWARD J. KLECKER, CLERK

By:Deborah Thomsen, Deputy.

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 86-5114-ND

Herbert O. Jensen,	*	
Appellant,	*	Appeal from the
vs.	*	United States Court
Winston Satran, Warden,	*	for the District
Appellee.	*	of North Dakota

Filed: June 13, 1986

ORDER

Before ARNOLD, JOHN R. GIBSON, and WOLLMAN, Circuit Judges.

On April 1, 1986, this court entered an order denying appellant's application for a certificate of probable cause with respect to an order entered by Judge Conmy on January 23, 1986, dismissing appellant's petition for a

writ of habeas corpus.

On April 28, 1986, appellant filed with this court a motion for reconsideration of there order denying the certificate of probable cause in which he alleges, among other things that Judge Conmy should not have ruled upon appellant's petition for a writ of habeas corpus in view of the fact that Judge Conmy was a law partner of Irving B. Nodland at the time Mr, Nodland reprresented appellant during his October 1977 trial, which resulted in the conviction with respect to which appellant filed his petition for habeas corpus relief. The state's response to appellant's motion does not challenge this allegation.

In as much as it appears that Judge Conmy may have inadvertently ruled on a matter that he would not have otherwise have participated in had he been aware of his former partner's representation, we vacate our order of April 1, 1986, grant a certificate of probable cause, vacate district court's order of January 23,

1986, denying appellant's petition for a writ of habeas corpus, and remand the case to the district court with direction to assign the case to another judge of that court for determination on the merits of appellant's claim for habeas corpus relief.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

Herbert O. Jensen,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil No. A1-84-183
	)	
Winston Satran, Warden,	)	
	)	
Respondent	)	

ORDER

The order of the United States Circuit entered on June 13, 1986, vacated a January 23, 1986 order of a judge of the district court dismissing the petition in the above captioned case, granted a certificate of probable cause and remanded the case with directions that it be assigned to another judge of the court for determination on the merits of petitioner's claim for habeas corpus relief.

The undersigned has accepted an assignment of the case and pursuant to 28 U.S.C. Sec. 636(b)(1)(B) and (C), and local rule 28(D),

does hereby designate Karen K. Klein to conduct such hearings and submit to the undersigned such findings and recommendations as may appear to be appropriate.

IT IS SO ORDERED.

Dated this 19th day of June 1986.

/s/ PAUL BENSON

PAUL BENSON, SENIOR JUDGE

UNITED STATE DISTRICT COURT

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 19th day of June, 1986.

EDWARD J. KLECKER

By:/s/R. HANSON, Deputy

APPENDIX J

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Herbert O. Jensen,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 86-5114-ND
	)	
Winston Satran, Warden,	)	
	)	
Appellee.	)	

Filed April 1, 1986

Application for certificate of probable cause has been considered by the Court, together with the original file of the United States District Court in case A1-84-183.

Being fully advised in the premises, it is ordered by the Court that the application be, and it is hereby denied.

A true copy, 4/23/86.

Attest: /s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

'Let the within Mandate be filed and entered on the Clerk's Records.'

Dated: May 5,1986 /s/Patrick A. Conmy

APPENDIX K

UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

Herbert O. Jensen,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil No. A1-84-183
	)	
Winston Satran, Warden,	)	
	)	
Respondent	)	

ORDER

The petitioner's Motion for A Certificate of Probable Cause to use in his appeal of the denial of a prior order of this court denying Petitioner's Habeas Corpus Petition is DENIED.

The reasons for the denial are set forth in the attached statement pursuant to Rule 22(b) F.R.App.P.

Dated this 7th Day of March, 1986, at Bismarck, North Dakota.

/s/PATRICK A. CONMY

Patrick A. Conmy, Chief Judge

United States District Court

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the clerk of the United States District Court for the District of North Dakota on the 7th day of March 1986.

EDWARD J. KLECKER, CLERK

By:/s/Deborah Thomasen

Filed Mar-7 1986-10:56 A.M.

EDWARD J. KLECKER, CLERK

U.S. DISTRICT COURT-NORTH DAKOTA

STATEMENT OF REASONS FOR REFUSING TO ISSUE A CERTIFICATE OF PROBABLE CAUSE

Mr. Jensen's habeas corpus petition was denied by this court on January 23, 1986. Mr. Jensen filed a NOTICE OF APPEAL together with a Motion for a Certificate of Probable Cause with this court on January 31, 1986. Pursuant to Rule 22, R.R.App.P., this court must wither issue of Certificate of Probable Cause or decline to issue such a certificate. If this court declines to issue a statement of reasons for the denial. This court refuses to issue a

Certificate of Probable Cause and this statement will outline the reasons for the refusal.

The United States Supreme Court recently rules on the necessity of a Certificate of Probable Cause in an appeal from the denial of a habeas corpus petition in: Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383 (1983). In Barefoot, the Court stated that a Certificate of Probable Cause functions as 'the primary means of separating meritorious from frivolous appeals'. Further, the petitioner is entitled to a Certificate if he makes a 'substantial showing of the denial of (a) federal right'. Finally, probable cause is shown if the petitioner can demonstrate that the issues raised in the appeal are 'debatable among jurists of reason'.

The statement filed by a district court judge when he refuses to issue a Certificate of Probable Cause should provide the Circuit with a basis upon which to review the decision made

by the district judge. The statement must contain more than a mere 'pro forma' reference to the reasons contained in the order denying the habeas action. Brown v. Booker, 622 FSupp 993 (E.D.Va 1985).

This court finds that the issues raised in Mr. Jensen's appeal are not 'debatable among jurists of reason'. In support of this finding, the court issues the following statement.

Mr. Jensen was arrested on two counts of murder in 1974. He was convicted of two counts of second degree murder in 1977 and sentenced as a dangerous special offender. Mr. Jensen, through counsel, appealed that conviction and was granted a new trial. State v. Jensen, 251 NW2d 182 (1977). Mr. Jensen was convicted following a second trial and again sentenced as a dangerous special offender, Mr. Jensen was represented by different counsel at both trials but the same judge. Judge Fredricks presided over each trial. The conviction was affirmed

on appeal. State v. Jensen, 282 NW2d 55 (1979). Mr. Jensen was sentenced to two 20 year terms with two 10 year terms as a dangerous special offender added. The defendant has brought numerous post-conviction actions, all of which have been denied. In this particular action, Mr. Jensen has alleged (8) issues which must be considered in light of the standards set forth above. This statement will address each in turn.

1. Mr. Jensen challenges his conviction because the county judges who held Mr. Jensen's preliminary hearings following his arrest in 1974 failed to file oaths of office with the Secretary of State's Office and therefore held there positions illegally. Under habeas corpus statute, 28 U.S.C. Sec.2254, the petitioner is not entitled to release from prison unless 'he is in custody in violation of the Constitution or laws or treaties of the United States.' The judges in question did not participate in Mr. Jensen's actual conviction or confinement. The

fact that they might not have filed oaths of office cannot be elevated to the status of a denial of a federal right.

2. Mr. Jensen challenges his conviction because the none of the various Assistant Attorneys General who have appeared on behalf of the state in the proceedings against Mr. Jensen filed Notices of Appearances on behalf of the state. Mr. Jensen cites, as authority for his contention, Rule 2(d)(3) of the Local Rules of the United States District Court for the District of North Dakota. The Local Rules of the federal district court had no bearing on Mr. Jensen's criminal trial which was held in state district court and conducted pursuant to the Rules of Criminal Procedure adopted by the State of North Dakota. additionally, this rule requires defense counsel to file a Notice of Appearance with the clerk of court before they will be allowed to represent the defendant. The rule has no application to Assistant Attorneys General who appear on

behalf of the prosecution and the rule only applies in criminal actions and has no bearing on post conviction proceedings.

3. Mr. Jensen challenges his conviction because the State s Attorney for the county in which Mr. Jensen was tried and convicted, Mr. LaQua allowed the Assistant Attorneys General to intervene and aid in the prosecution. Mr. Jensen claims that Mr LaQua should have requested the judge to appoint special counsel to assist and that without a specific order from the trial judge allowing such assistance Mr. LaQua was deficient in the duties of his elected office when he accepted the aid of the Assistant Attorneys General in the original prosecution. Mr Jensen also objects to the Assistant attorneys general s appearance in the post-convictoion proceedings the State's Attorney for each county has the primary burden of prosecuting criminal trials, Section 11 16 01 1 NDCC. the attorneys connected with the Attorney General's Office have statutory

authority to assist in the prosecution of criminals, section 54-12-01(5) NDCC. These same attorneys, including Special Assistant Attorney General Edwin F. Zuern have the duty to 'appear and defend' all actions and proceedings against any state officer, section 54-12-01(2). The appearance of thes attorneys at either the trial or in any of the post-conviction proceedings do not constitute a denial of any federal right.

4. Mr. Jensen challenges his conviction based on allegations that he did not have effective assistance of counsel. Mr. Jensen raised this issue in a prior appeal where the North Dakota supreme Court reviewed the record of the second trial and concluded that 'there (was) absolutely no showing whatsoever that Jensen's defense counsel were inadequate

State v. Jensen 333 NW2d 886, 897 1983

In support of the charge of ineffective assistance of counsel made in his federal habeas corpus petition Mr Jensen listed 34

motions which his counsel could have made but failed to make during his trial Mr. Jensen does not allege how the trial outcome would have been different or how Mr Jensen was prejudiced on appeal by the failure to make these motions This allegation does not give rise to a substantial showing that a federal right has been denied Mr Jensen includes in this portion of his challenge the fact that he was not present during a portion of the proceedings which were held in chambers Mr Jensen does not allege what took place during the in Chambers conference by Mr Jensen s attorney was present Neither does this allegation give rise to a substantial showing that a federal right has been denied

5 Mr. Jensen challenges his conviction on the fact that certain portions of the trial including Opening and Closing Arguments and Jury Instructions werenot recorded by the Court Reporter Mr Jensen does not allege that anything improper was said during these

arguments and when the jury was instructed. In fact the jury instructions were in written form and were included in the record. The mere fact that these proceedings were not recorded without a showing of harm resulting therefrom does not give rise to a substantial showing that a federal right has been denied.

Mr Jensen challenges his conviction on the ground that he was denied discovery in his post conviction proceedings. Mr Jensen was not allowed to pursue avenues of discovery which might have determined whether the missing oaths of office were or were not filed by the county judges as alleged in Mr. Jensen's first challenge in this appeal. In fact Mr Jensen was prohibited by a protective order issued by a North Dakota district Judge from bothering the Secretary of State's office. Even if Mr Jensen were allowed to pursue this discovery the fact oaths of office were or were not filed would not effect the constitutionality of Mr Jensen's conviction. Therefore the denial of

these avenues of discovery do not amount to the denial of a federal right.

7. Mr. Jensen challenges his conviction on the grounds that he was prejudiced by the label which a North Dakota district court judge, the same judge who entered the Protective Order referred to above, applied to Mr. Jensen's subpoena designed to obtain the requested discovery. Judge Graff called the subpoena 'garbage'. While this label might have offended Mr. Jensen, the application of the label did not amount to a denial of a federal right.

8. Finally, Mr. Jensen challenges his conviction due to the fact that one of the prosecuting attorneys at the second trial announced to Judge Fredricks that Mr. Jensen was being charged as a dangerous special offender. At the time of the first trial, the North Dakota Dangerous statute precluded the trial judge from being made aware, prior to sentencing, that the prosecution would be requesting sentencing as a dangerous special

offender. The statute was amended prior to the second trial. The amendment allowed the trial judge, but not the jury, to be made aware of such intentions. This issue has been reviewed by the North Dakota Supreme Court in State v. Jensen, 333 NW2d 697 (1983), where the court determined that this was a procedural question and would be determined by the status of the law at the time of the second trial. Regardless of whether or not it was improper for the prosecuting attorney to mention the state's intention of requesting dangerous special offender status to the judge prior to sentencing, the fact remains that the trial judge in the second trial was the same judge who, in fact, sentenced Mr. Jensen as a dangerous special offender in the first trial. There is nothing to show that a request was made that Judge Fredricks recluse himself due to his knowledge that Mr. Jensen perhaps had the qualifications of a dangerous special offender. Mr. Jensen merely objects that one of

the prosecuting attorneys discussed this with Judge Fredricks. This does not amount to the denial of a federal right.

In summary, Mr. Jensen has failed to raise issues which make a substantial showing that he has been denied a federal right. It is clear to me that the issues raised by Mr. Jensen would not be debatable among jurists of reason.

FOR THE REASONS STATED ABOVE, I DECLINE TO ISSUE A CERTIFICATE OF PROBABLE CAUSE IN THIS APPEAL.

Dated this 7th day of March, 1986 at Bismarck, North Dakota.

/s/ PATRICK A. CONMY

Patrick A. Conmy, Chief Judge
United States District Court

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota

on the 7th day of March, 1986.

EDWARD J. KLECKER, CLERK

By: Deborah Thomasen

Deputy

PUBLISHER'S NOTE:

Original Pagination is not continuous.

APPENDIX L

UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

Herbert O. Jensen,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil No. A1-84-183
	)	
Winston Satran, Warden,	)	
	)	
North Dakota State	)	
	)	
Penitentiary	)	
	)	
Respondent.	)	

ORDER

Herbert O. Jensen originally filed this habeas corpus action in this court on September 6, 1984. It was held in abeyance pending exhaustion of State Court remedies and is now before this Court once again. This is the sixteenth actions filed in this court by Mr. Jensen since his conviction of Second Degree Murder on November 29, 1977.

This habeas corpus action is filed pursuant to 28 U.S.C. Sec. 2254. According to subsection

(a) of Section 2254, a district court can only consider habeas corpus motions filed by persons held pursuant to state court order if the petitioner grounds his petitioner violation of the constitution or Laws of the United States. Mr. Jensen has alleged that his constitutional rights to Equal Protection and Due Process were violated, that he was subjected to double jeopardy and that he wasn't provided with effective counsel. Mr. Jensen has enumerated factual situations to support his claims.

The North Dakota Supreme Court has held evidentiary hearings and reviewed the facts alleged in mr. Jensen's petition. The Supreme Court then concluded that the situations presented did not entitle Mr. Jensen to Post-Conviction relief. Mr. Jensen disagrees with that conclusion. No new facts are argued before this court. Mr. Jensen has requested discovery in order to bolster his claim that certain portions of the proceedings were not recorded and that certain technicalities of

state appointment procedures were not entitled Mr. Jensen to the relief requested.

This court is mindful of the policy to be lenient and tolerant when reviewing habeas corpus petitions which are often filed pro se by persons not skilled in the law. If the facts in this case were as Mr. Jensen alleged them to be, they still do not amount to a violation of his constitutional rights nor to a violation of Any federal law.

The fact that the Dangerous Special Offender statutes and provisions for additional sentencing were applied to Mr. Jensen and were not applied to various other persons convicted of second degree murder does not demonstrate a violation of his Equal Protection rights. Nor were his Equal Protection Rights denied when he was subjected to two mental examinations. The fact that several Assistant Attorneys General appeared and helped to prosecute Mr. Jensen did not infringe upon his Due Process rights, those attorneys appeared pursuant to section

54-12-01(5),NDCC. Mr. Jensen was not subjected to double jeopardy when his bail was raised from $10,000 to $100,000. Mr. Jensen lists 34 objections and motions that his counsel failed to make in support of his claim that he had ineffective counsel. He made the same arguments before the North Dakota Supreme Court on one of his post-conviction appeals. Following review of the record of Mr. Jensen's second trial, that court concluded that there was absolutely no showing that the defense counsel was inadequate.

State v. Jensen, 333 NW2d 686 (ND 1983).

Rule 4 of the Federal Rules of Evidence governing habeas corpus actions allows the judge to summarily dismiss a habeas corpus petition if 'it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court.' 'While the court is reluctant to take such a drastic step, a review of this action leads the court to conclude

that the application contains no substantive allegations of Constitutionality of Federal law Violations and so is improperly filed. It is this Court's duty to weed out frivolous applications for a writ of habeas corpus.' Allan v. Perini, 424 F2d 134 (6th Cir. 1970). This court feels obligated to dismiss this action.

Dismissal of this application will render the various motions filed in the action moot. Therefore. the court will not rule on those motions.

IN LIGHT OF THE FORGOING CONSIDERATIONS, IT IS ORDERED THAT THIS PETITION OF HABEAS CORPUS BE DISMISSED WITH PREJUDICE.

Dated this 23rd Day of January, 1986 at Bismarck, North Dakota.

/s/PATRICK A. CONMY

Patrick A. Conmy
Chief Judge, United States
District Court, District
of North Dakota.

NOTICE OF ENTRY

Take notice that the original of this case was entered in the office of the clerk of Court of the United States District Court for the District of North Dakota on the 23rd day of January 1986.

EDWARD J. KLECKER

APPENDIX M

UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

Herbert O. Jensen,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil No. A1-84-183
	)	
Winston Satran, Warden,	)	
	)	
Respondent.	)	

MEMORANDUM and ORDER

This is the first order on the sixteenth proceeding this petitioner has brought since his conviction on November 29, 1977, and the imposition of two concurrent sentences of twenty years for second degree murder and ten years as a dangerous offender. (N.D. Crim. No.'s 613, 614). Of these sixteen suits, thirteen have been closed and three are pending. *1) Although this is petitioner's fourth habeas action in federal court, this is

*1)

Nor is the petitioner a stranger to litigation before the courts of North Dakota. See: State v. Jensen, 241 NW2d 557 (N.D. 1976), State v. Jensen, 251 NW2d 182 (N.D. 1977); State v. Jensen, 265 NW2d 691 (N.D. 1978), State v. Jensen, 282 NW2d 55 (N.D. 1979), State v. Jensen, 303 NW2d 568 (N.D. 1981); State v. Jensen, 332 NW2d 222 (N.D. 1983); State v. Jensen, 333 NW2d 686 (N.D. 1983); Zuern v. Jensen, 336 NW2d 329 (N.D. 1983); Jensen v. Zuern, 336 NW2d 330 (N.D. 1983);

Published decisions in the federal courts involving the petitioner including, Jensen v. Klecker, 599 F2d 243 (8th Cir. 1979), Jensen v. Klecker, 648 F2d 1179 (8th Cir. 1981); Jensen v. Satran. 651 D2d 605 (8th Cir. 1981); Jensen v. Dole, 677 F2d 678 (8th Cir. 1982);

his first habeas suit that questions the validity of his conviction. Like most of the other suits, this action is brought pro se.

Petitioner has filed a habeas action under 28 U.S.C. Sec. 2254. This Court cannot entertain such a petition unless the applicant has exhausted the remedies available in the states courts. Petitioner has failed to describe within the petition the final disposition of his request for state post-conviction remedies. In order to determine whether the petitioner has 'any available procedure' in which to exhaust his state remedies, it is necessary to hold this action in abeyance until petitioner has attempted to bring the issues contained

*1) continued -

Jensen v. Satran, 688 F2d 76 (8th Cir 1982);

Jensen v. Klecker, 702 F2d 131 (8th Cir. 1983),

Jensen v. Schweiker, 709 FSupp 35 (8th Cir. 1984);

in his petition before the North Dakota supreme Court.

FACTS

On September 6, 1984, petitioner filed a habeas corpus petition pursuant to 28 U.S.C. Sec. 2254 (1976). Petitioner was initially convicted of murder on February 19, 1976. On February 17, 1977, the North Dakota Supreme Court reversed the conviction and remanded the case for a new trial.

State v. Jensen, 251 NW2d 182 (N.D. 1977). Petitioner was convicted of murder at his second trial (November 29, 1977), this was affirmed. 282 NW2d 55 (1979).

Petitioner subsequently applied for post-conviction relief and moved for a new trial. On August 23, 1982, the state district court orally announced its findings and order denying post-conviction relief and the Motion for a New Trial. Petitioner filed his notice of appeal on August 30th, several weeks before the trial court signed the written order.

On appeal , the North Dakota Supreme Court affirmed the denial of a new trial. The Court also held that petitioner's appeal for post-conviction relief was premature and dismissed that portion of the appeal. 333 NW2d 686 (N.D. 1983). At the same time, the court recognized that the 'six month time period during which Jensen could conceivably have corrected the defect in the timing of his notice of appeal has expired.' 333 NW2d at 690, citing N.D. Cent. Code Sec. 29-32-09. In addition the court stated that its ruling could be considered as a precedent only in regards to the motion for a new trial, even though the motion for a new trial concerned many of the issues raised by the application for post-conviction relief. 333 NW2d at 391 n.3.

POSSIBILITY OF AVAILABLE STATE PROCEDURE

The North Dakota Constitutionn provides that, 'the privilege of the writ of habeas shall not be suspended unless, when in case of rebellion or invasion, the public safety may require.'

N.D. Const. art I & 14. The North Dakota Supreme Court has original jurisdiction of 'or original or remedial' writs. N.D. Const. art. VI, & 2. In 1969, the North Dakota legislature enacted the uniform Post-Conviction Procedure Act., 1969 N.D. Sess. Laws ch. 304 (codified as amended at N.D. Cent. Code && 29-32-01 to -10, 1974 & Supp. 1983). Section 9. of the act requires the applicant to bring an appeal of a lower court's denial of post-conviction relief 'within six months . . . from the entry of the judgment.' N.D. Cent. Code & 29-32-09 (1974).

In Mcquire v. Warden of State Farm. the North Dakota Supreme Court stated that:

> '(I)t is clear, we believe that the Uniform Post-Conviction Procedure Act was intended to replace, so far as persons arrested for, or convicted of violations of criminal law are concerned, the habeas statutes . . .. If the provisions of the Uniform Post-Conviction Procedure Act were less favorable to the accused than the constitutional

right of habeas corpus, we would necessarily have to hold the Uniform Post-Conviction Procedure Act to that extent unconstitutional, in view of the preemptory mandate of the Constitution of North Dakota . . ..'

*2)Mcguire, 299 NW2d 211, 215 (N.D. 1975)(footnote omitted). The Mcguire Court held that the requirement of bringing habeas petitions before the district court in the district of conviction, as opposed to the district of confinement, 'is a reasonable regulation' and 'constitutionally permissible.' In reaching this result, the court relied on their earlier decision of Carruth v. Taylor, 8 ND 166, 77 NW 617 (1898), which stated that 'a reasonable restriction upon the exercise of (the) constitutional right' of habeas corpus is allowable, but 'no legislation can wolly

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*2)The North Dakota habeas corpus statutes are found at N.D. Cent. Code ch. 32-22.

deprive this court of its right to issue the 'liberty writ' in the exercise of its original jurisdiction.' Id. at 174, 175, 75 NW 621.

The Mcguire Court also stated, apparently in dicta, that 'we find no provision of the (Post-Conviction Procedure) act which restricts the constitutional right', Mcguire 229 NW2d at 215.

To this court's knowledge, the North Dakota Supreme court has not ruled on whether the six-month time limit contained in & 29-32-09 restricts the Supreme Court's original jurisdiction of habeas corpus applications provided by the North Dakota Constitution. On one hand, the court has stated that the Post-Conviction Procedure Act replaces the habeas corpus statutes in the area of criminal law, that Jensen has missed the six-month requirement of & 29-32-09, and that no provision of the act restricts the constitutional right of habeas corpus.

On the other hand, the court has held that

unreasonable restrictions on the exercise of the right are unconstitutional and that no legislation can deprive the court of its right to issue the writ in the exercise of its original jurisdiction.

Given the relevant constitutional provisions legislative enactments, and court holdings, at least three possible resolutions of this issue come to mind. First, it is possible that the six-month requirement is a reasonable restriction on the writ, and is therefore constitutional. Second, it is possible that the statute unreasonably limits the writ or is contrary to the state constitution and is therefore void. Third, it is possible that the Post-Conviction Procedure Act replaces the previous habeas corpus statutes, but does not limit the North Dakota Supreme Court's original jurisdiction provided by the North Dakota Constitution. Under the first interpretation, petitioner has exhausted his available state remedies and this Court has the authority to

proceed with the petition. Under the other two interpretations, and adequate state remedy is available and the petition must be dismissed.

It is apparent that the petitioner has not filed any post-conviction or habeas corpus actions following the Supreme Court's dismissal of his appeal. See Petitioner at 26. In an attempt to determine if such a motion for relief had been made by the petitioner, this court contacted the Clerk of the North Dakota supreme court. The Clerk's review of her files failed to disclose any subsequent petition for habeas corpus or post-conviction relief that challenges his conviction.

This court finds it appropriate to hold this action in abeyance until the North Dakota Supreme Court has had the opportunity either to reach the merits of petitioner's claims or demonstrate that petitioner has no further available remedy through the state courts.

IT IS THEREFORE ORDERED

1) that the above entitled action is held in

abeyance until further order of this court; 2) that if petitioner fails to bring an action for habeas corpus relief before the North Dakota Supreme Court within thirty days of this date, this action shall be dismissed pursuant to 28 U.S.C. 2254(b) (1976); if petitioner has already failed such an action subsequent to the Supreme Court's dismissal of his post-conviction relief appeal, he shall notify this Court in writing within ten days of the date of this order; and 3) that petitioner's motion for use of the discovery process is DENIED without prejudice.

Dated at Bismarck, North Dakota this 22nd day of October 1984.

/s/Bruce M Van Sickle

Bruce M. Van Sickle, Judge

APPENDIX N

State Enactments

The North Dakota Legislature enacted CRIMINAL LAW REVISION, 1973 N.D. Sess. Laws ch. 116, Approved March 15, 1973.

Section 1.) Chapter 12.1-01 of the North Dakota Century Code is hereby created and enacted to read as follows:

12.1-01-01. TITLE, RETROACTIVITY, ...

2. This title, except as provided in subsection 3 of this section shall not apply to offenses committed prior to its effective date. Prosecutors for such offenses shall be governed by prior law, which is continued in effect for that purpose. For the purposes of this section, an offense was committed prior to the effective date of this title if any of the elements of the offense occurred prior thereto.

3. In cases pending on or after the effective date of this title, and involving offenses committed prior thereto:

a. The provisions of this title according a

defense or mitigation shall apply with the consent of the defendant; and

b. The Court, with consent of the defendant may impose sentence under the provisions of this title which are applicable to the defense and the offender.

Section 31.) Chapter 12.1-32 of the North Dakota Century Code is hereby created and enacted to read as follows:

NDCC 12.1-32-09.) 1. A court may sentence a convicted offender to an extended sentence as a dangerous special offender in accordance with the provisions of this section upon a finding of any one or more of the following:

a. The convicted offender is a dangerous, mentally abnormal person. The court shall not make such a finding unless the pre-sentence report, including a psychiatric examination, concludes that the offender's conduct has been characterized by persistent aggressive behavior, and that such behavior makes his a

serious danger to other persons.

b. The convicted offender is a professional criminal. the Court shall not make such a finding unless the offender is an adult and the presentence report shows that the offender has substantial income or recourse derived from criminal activity.

c. The convicted offender is a persistent offender. The Court shall not make such a finding unless the offender is an adult and has previously been convicted of two felonies class B or above, or of one class B felony or above plus two offenses classified below class B felony committed at different times when the offender was an adult.

d. The offender was convicted of an offense which seriously endangered the life of another person, and the offender had previously been convicted of a similar offense.

e. The offender is especially dangerous because he used a firearm, dangerous weapon, or destructive device in the commission of the

offense or during the flight therefrom. A conviction shown on direct or collateral review or at the hearing to be invalid or for which the offender has been pardoned on the grounds of innocence shall be disregarded for purposes of subdivision c. In support of findings under subdivision b, it may be shown that the offender has had in his own name or under his control income or property not explained as derived from a source other than criminal activity. For purposes of subdivision b, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-hour week and a fifty-week year, without reference to exceptions, under section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the offender's declared adjusted income under chapter 57-38.

2. The extended sentence may be imposed in the following manner:

a. If the offense for which the offender is convicted is a class A felony, the court may impose a sentence up to a maximum of life imprisonment.

b. If the offense for which the offender is convicted is a class B felony, the court may impose a sentence up to a maximum of imprisonment for twenty years.

c. If the offense for which the offender is convicted is a class C felony, the court may impose a sentence up to a maximum of imprisonment for ten years.

3. Whenever an attorney charged with the prosecution of a defendant in a court of this state for an alleged felony committed when the defendant was over the age of eighteen years has reason to believe that the defendant is a dangerous special offender, such attorney, at a reasonable time before trial or Acceptance by the court of a plea of guilty, may sign and

file with the court, and may amend, a notice specifying that the defendant is a dangerous special offender who upon conviction for such a felony is subject to the imposition of a sentence under subsection 2, and setting out with particularity the reasons why such attorney believes the defendant to be dangerous special offender. In no case shall the fact that the prosecuting attorney is seeking sentencing of the defendant as a dangerous special offender be disclosed to the jury, or be disclosed, before any plea of guilt, to the presiding judge without consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special

offender and his counsel.

4. Upon any pleas of guilty, or verdict or finding of guilt of the defendant of such felony, a hearing shall be held, before sentencing is imposed, by the court sitting without a jury. Except in the most extraordinary cases, the court shall obtain a presentence report and may receive a diagnostic testing report under subsection 4 of section 12.1-32-02 before holding a hearing under this subsection. The Court shall fix a time for the hearing, and notice therefor shall be given to the defendant and the prosecution at least five days prior thereto. The Court shall permit the prosecution and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously

disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted.

In connection with the hearing, the de defendant shall be entitled to compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenicated copy of a former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the

defendant to imprisonment for an appropriate term within the limits specified in subsection 2. The court shall place in the record its findings including and identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

Section 42. EFFECTIVE DATE.) The provisions of this act shall become effective on July 1, 1975.

APPENDIX O

State Enactments

NDCC 11-16-06: Failure of State's attorney to perform duty - Power of Court - Appointment of acting State's attorney.

If it shall appear, by affidavit or otherwise, to the satisfaction of a judge of the district court of the judicial district in which the county is situated, that the county has no state's attorney, or that the state's attorney is absent or unable to attend to his duties, or that the state's attorney has refused or neglected to perform any of the duties prescribed in subsections 2 through 6 of section 11-16-01, or to institute any civil suit to which the state or the county is a party after the matter has been properly brought to the attention of such state's attorney, and that it is necessary that some act be performed, the judge shall:

1. Request the attorney general or an assistant attorney general to take charge of

APPENDIX C

State Department

NSCC 11 10-00: Failure of State's Assistant Secretary for [illegible] - Count of Court - Appointment of Acting Secretary.

If it should appear, by a [illegible] affidavits, to the satisfaction of [illegible]

such prosecution or proceeding; or

2. Appoint an attorney to take charge of such prosecution or proceeding and fix his fee therefore by an order entered upon the minutes of the court, and the attorney so appointed shall be vested with the powers of the state's attorney for the purposes of that action, but for no other purpose and shall be the only person authorized to proceed in such action . . . .

Repealed Chapter 1943 & 11-1606.

APPENDIX P

State Enactments

NDCC 11-16-07: District judge may appoint special counsel to assist state's attorney - Compensation.

The judge of the district court may appoint special counsel to assist the state's attorney in an important case. The county for which the services were rendered shall pay special counsel a reasonable fee therefor to be approved by the court.

Repealed Chapter 1943 & 11-1607.

APPENDIX Q

State Enactments

NDCC 12-06-06: Jury determines degree of crime.

Whenever a crime is distingished into degrees, the jury, if it convicts the defendant must find the degree of the crime of which he is guilty. Whenever a verdict of guilty is rendered against the accused upon a prosecution for homicide, the jury must find the degree thereof and determine by its verdict the punishment to be inflicted within the limits prescribed by law.

Repealed March 15, 1973, Effective July 1, 1975. (See APPENDIX N, Section 1.)

APPENDIX C

APPENDIX R

State Enactments

NDCC 12-27-08: 'Murder' defined.

Homicide is murder in the following cases:

1. When perpetrated without authority of and with a premeditated design to effect the death of the person killed or of any other human being;

2. When perpetrated by any act imminently dangerous to others and evincing a depraved mind, in disregard of human life, to effect the death of any particular individual; and

3. When perpetrated without any design to effect death by a person engaged in the commission of any act or commission which may be punished by imprisonment in the penitentiary under any law of this state without regard to the punishment actually imposed.

Repealed: See Appendix N, Section 1.

APPENDIX S

State Enactments

NDCC 12-27-12: Degrees of murder defined.

Every murder perpetrated by means of poison or by lying in wait, or by torture, or by other willful, deliberate, or premeditated killing, or in committing or attempting to commit any sodomy, rape, mayhem, arson, robbery, or burglary, is murder in the first degree. All other kinds of murder are murder in the second degree.

Repealed: See APPENDIX N, Section 1.

APPENDIX.

State Enactments.

Miss. 12-27-12: Degrees of murder defined.

Every murder perpetrated by means of poison or by lying in wait, or by torture, or by other kind of deliberate, or premeditated killing, or in committing or attempting to commit any robbery, rape, burglary, arson, or kidnaping is murder in the first degree. All other kinds of murder are murder in the second degree.

(Supplement to APPENDIX N, Section 1).

APPENDIX T

State Enactments

NDCC 12-27-14: Punishment for murder in the second degree:

Every person convicted of murder in the second degree shall be imprisoned in the penitentiary for not less than ten years nor more than thirty years.

Repealed: See APPENDIX N, Section 1.

APPENDIX U

State Enactments

NDCC 27-06-03: Duties of district court reporters.

Each district court reporter shall attend the district court sessions within or without the district whenever the judge appointing him shall so direct and shall take in shorthand all testimony given orally by the witnesses, all objections and rulings made and exceptions taken, any instructions given orally by the court, and all other proceedings at the hearing or trial not otherwise reduced to writing. District Court reporters shall perform such other duties as the appointing district court judges may designate.

Repealed Chapter 1943 & 27-0603; S.L. 1963 ch. 233, & 2.

APPENDIX V

State Enactments

CHAPTER 29-32, UNIFORM POST-CONVICTION PROCEDURE ACT. (Repealed by S.L. 1985, ch. 366 & 16).

NDCC 29-32-07: Hearing - Evidence - Order.

The application shall be heard in, and before any judge or his successor of, the court in which the conviction took place. A record of the proceedings shall be made and preserved, ALL rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to the parties. The court may receive proof by affidavits, depositions, oral testimony, or other evidence and may order the applicant brought before it for the hearing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail,

discharge, correction of sentence, or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment.

CHAPTER 29-32.1, UNIFORM POST-CONVICTION PROCEDURE ACT. Note. This chapter governs all convictions occuring after June 30, 1985. North Dakota Century Code, Replacement, Volume 5A, 1985 Pocket Supplement.

APPENDIX W

State Enactments

NDCC 44-04-18: Access to public records - Penalty.

1. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureaus, commissions or agencies of the state or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

2. Violations of this section shall be punishable as an infraction.

SOURCE: S.L. 1977, ch. 416, & 1.

ANNEXE A

Liste des documents

Pour la Cour :

1. Exemplaire de l'affidavit produit devant la Cour fédérale du Canada, Section de première instance, dossier T-1234-87, le 15 décembre 1987.

2. Exemplaire de l'affidavit produit devant la Cour fédérale du Canada, Section de première instance, dossier T-1234-87, le 16 décembre 1987.

3. Exemplaire de l'affidavit produit devant la Cour fédérale du Canada, Section de première instance, dossier T-1234-87, le 17 décembre 1987.

4. Exemplaire de l'affidavit produit devant la Cour fédérale du Canada, Section de première instance, dossier T-1234-87, le 18 décembre 1987.

APPENDIX X

State Enactments

NDCC 54-12-04: Attorney general to investigate and prosecute criminal matters in counties on demand of district judge . . ...

Upon written demand of a judge of the district court, with or without the consent and approval of the state's attorney of the county whereinsuch duties are to be performed the attorney general, either personally or through his assistants, shall be required to make full and complete investigation of any criminal matter or complaint referred to,in the demand. He shall take full charge of and shall conduct any criminal prosecution in any county within the district of said district judge to the same effect and with like power and authority as the duly elected state's attorney of that county. SOURCE: S.L. 1935, ch. 125 & 1. R.C. 1943, & 54-1204.

APPENDIX Y

State Enactments

NDCC 54-12-08: Special Assistant Attorney general - Appointment - Revocation -. . ..

The attorney general also, when he deems it necessary, may after consultation with the head of the state department or institution affected appoint special assistant attorneys general, and no state officer, head of any state department, whether elected or appointed or state department shall employ legal counsel and no person shall act as legal counsel, in any matter, action or proceeding in which the state or any state department is interested or is a party, except upon appointment by the attorney general.

The appointment shall be in writing.

The powers conferred upon such special assistant attorneys general shall be the same as are exercised by the regular assistant attorneys general, when such powers are not limited specifically by the terms of such

appointment shall be revocable at the pleasure of the attorney general.

SOURCE: S.L. 1945, ch. 290, & 1; 1957 Supp., & 54-1208.